GENERAL PRODUCE AGENCY SDN BHD & ANOR

v.

PEMUNGUT DUTI SETEM

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
KC VOHRAH JCA
MOHD NOOR AHMAD JCA
[CIVIL APPEAL NO: P-02-833-98]
19 JUNE 2002

REVENUE LAW: *Stamp duty - Liability to duty - Sale of land - Execution of transfer instrument - Whether transfer effected between associated companies - Whether third party could impose conditions on agreement between appellants - Whether appellants exempted from paying stamp duty - Whether s. 15A(4)(c) of Stamp Duties Act 1949 applicable*

The first appellant owned over 90% of the equity of the second appellant. The second appellant agreed to purchase a piece of land from the first appellant and a transfer instrument was executed. An application for exemption on stamp duty was made to the collector under s. 15A of the Stamp Duties Act 1949 ('the Act'). The collector rejected the application on the premise that the Foreign Investment Committee ('the FIC') imposed a condition upon the second appellant to divest 30% of its equity to a Bumiputera company which in effect reduced the equity held by the first appellant to less than 90% and thus disqualified the said instrument from exemption as per s. 15(4)(c) of the Act.

The matter on the refusal of the said application came before the High Court which upheld the decision of the collector. Hence, this appeal.

Held:
Per KC Vohrah JCA

[1] Section 15A of the Act provides that stamp duty is not chargeable on an instrument of transfer of property between "associated" companies, *ie*, where one company has over 90% of the issued share capital of the other. (p 696 e)

[2] Section 15A(4) of the Act was meant to prevent tax avoidance and s. 15A(4)(c) is the catch-all provision for such a purpose. However, at present, there was no hint that the associated companies had made an arrangement to avoid paying stamp duty on the first or second transfer instrument. From the first agreement, no other party was involved in the earlier agreement to transfer the said land and clearly there was no issue

of a non-associated party buying the part of shares which the first appellant held in the second company and diluting its beneficial ownership of the second appellant. (p 704 a-b)

[3] Regarding the fresh agreement, the appellants had in no way arranged to avoid paying the stamp duty on the fresh transfer instrument of the same property on the same consideration. (p 704 c)

[4] The FIC was not a party to the fresh agreement entered into between the first appellant and the second appellant. In the context of s. 15, the imposition of a condition by a stranger, *ie*, the FIC, which the appellants felt compelled to abide by did not allow a conclusion that the appellants intended to avoid paying stamp duty on the transfer instrument. It would be unjust to interpret s. 15A(4)(c) in that way. (p 704 e-f)

[5] The condition of the 30% equity divestment to a Bumiputera company involved matters which were uncertain as to the identity of the purchaser and the time that event of divestment would be realised; in fact it may or may not be realised. (p 704 h)

[6] The issue of exemption from stamp duty on the transfer instrument between the appellants was separate from the issue of the imposition of the condition by the FIC which is a policy matter where the remedy for non-compliance lies elsewhere, not under s. 15A. Accordingly, s. 15A(4)(c) did not apply and the fresh transfer instrument was exempt from stamp duty. (p 705 a-b)

[Appeal allowed with costs; assessment paid on transfer instrument be refunded.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu pertama memiliki lebih daripada 90% ekuiti perayu kedua. Perayu kedua bersetuju untuk membeli sebidang tanah daripada perayu pertama dan satu memorandum pindahmilik telah dimeterai. Satu permohonan untuk pelepasan duti setem telah dibuat kepada pemungut di bawah s. 15A Akta Duti Setem 1949 ('Akta tersebut'). Pemungut menolak permohonan itu atas alasan Jawatankuasa Pelaburan Asing (JPA) mengenakan syarat kepada perayu kedua untuk melepaskan 30% ekuitinya kepada sebuah syarikat Bumiputera yang kesannya mengurangkan ekuiti yang dipegang oleh perayu pertama kepada kurang daripada 90% dan seterusnya tidak melayakkan memorandum tersebut daripada pelepasan di bawah s. 15(4)(c) Akta tersebut.

Perkara berkenaan penolakan permohonan tersebut dibawa kepada Mahkamah Tinggi yang mengesahkan keputusan pemungut tersebut. Oleh itu, rayuan ini.

Diputuskan:
Oleh KC Vohrah HMR

[1] Seksyen 15A Akta tersebut menyatakan duti setem tidak dikenakan ke atas memorandum pindahmilik hartanah di antara syarikat bersekutu, di mana satu syarikat mempunyai lebih daripada 90% saham terbitan modal syarikat satu lagi.

[2] Seksyen 15A(4) Akta tersebut adalah untuk mengelakkan pelepasan cukai dan s. 15A(4)(c) adalah proviso yang lengkap untuk tujuan tersebut. Bagaimanapun, pada masa ini, tiada petunjuk yang syarikat-syarikat bersekutu telah membuat perancangan untuk mengelak membayar duti setem untuk memorandum pindahmilik pertama atau kedua. Daripada perjanjian pertama, tiada mana-mana pihak terlibat di dalam perjanjian awal untuk memindahmilik tanah tersebut dan adalah jelas tiada isu pihak tidak bersekutu membeli sebahagian saham yang dipegang perayu pertama di dalam syarikat kedua dan mencairkan hakmilik benefisial perayu kedua.

[3] Merujuk kepada perjanjian baru, perayu-perayu tidak lansung mengatur untuk mengelak membayar duti setem ke atas memorandum pindahmilik baru hartanah yang sama dan balasan yang sama.

[4] JPA bukanlah pihak kepada perjanjian baru yang dimasukki di antara perayu pertama dan perayu kedua. Di dalam konteks s. 15, pengenaan syarat oleh pihak asing, JPA, di mana perayu-perayu merasa terpanggil untuk mematuhinya tidak membenarkan kesimpulan bahawa perayu-perayu berniat untuk mengelak membayar duti setem ke atas memorandum pindahmilik. Adalah tidak adil untuk menterjemah s. 15A(4)(c) secara begitu.

[5] Syarat pelupusan 30% ekuiti kepada syarikat Bumiputera melibatkan perkara-perkara yang tidak menentu seperti identiti pembeli dan tempoh masa apabila pelupusan terjadi, sebenarnya ianya mungkin atau mungkin tidak terjadi.

[6] Isu pelepasan daripada duti setem ke atas memorandum pindahmilik di antara perayu-perayu adalah terpisah daripada isu pengenaan syarat oleh JPA yang mana ianya adalah perkara polisi di mana penawar kepada ketidakpatuhan terletak di tempat lain, bukannya di bawah s. 15A. Berikutnya, s. 15A(4)(c) tidak terpakai dan memorandum pindahmilik yang baru adalah terkecuali daripada duti setem.

[Rayuan dibenarkan dengan kos, taksiran dibayar ke atas memorandum pindahmilik dipulangkan.]

Case(s) referred to:
Escoigne Properties Ltd v. IRC [1958] AC 549 ***(refd)***
Holmleigh (Holdings) Ltd v. IRC 46 TC 435 ***(refd)***

Legislation referred to:
Stamp Duties Act 1949, ss. 15A, 15A(1), (4)(a), (b), (c), 39
Finance Act [UK], s. 27(3)
Finance Act 1930 [UK], s. 42
Finance Act 1940 [UK], s. 42(a), (b), (c)
Finance Act 1967 [UK], s. 27(3)

Other source(s) referred to:
Monroe & Nock, *Law of Stamp Duties*, 5th edn, p 320, footnote 46, p 335

For the appellant - Rumi Manecksha; M/s Ong & Manecksha
For the respondent - Khairuddin Abdullah; Inland Revenue Board

[Appeal from High Court, Pulau Pinang; Originating Motion No: 25-63-97]

Reported by M Maheswaran

JUDGMENT

KC Vohrah JCA:
Under s. 15A of the Stamp Duties Act 1949 (Act 378) ('the Act') stamp duty is not chargeable on an instrument of transfer of property between "associated" companies, companies where one of them has over 90% of the issued share capital of the other.

In this case General Produce Agency Sdn Bhd ('the 1st appellant') owns over 90% of the equity of General Produce Housing Sdn Bhd ('the 2nd appellant'). In an agreement the 2nd appellant agreed to purchase a piece of land from the 1st appellant for a consideration and a transfer instrument was executed and an application for exemption of stamp duty on the instrument under s. 15A was submitted to the collector.

The collector rejected the application holding that there was a condition which had been imposed by a governmental committee, the Foreign Investment Committee, that the 2nd appellant should divest 30% of its equity to a Bumiputera company by a certain date and since there was such an arrangement where the 1st appellant company would cease to have more than 90% of the equity in the 2nd appellant company within the meaning of s. 15A(4)(c) of the Act, the instrument of transfer did not qualify for exemption from stamp duty.

The two companies appealed to the High Court by way of a case stated under s. 39 of the Act against the collector's rejection for exemption. The learned High Court judge agreed with the collector's views. Thus this appeal by the two companies.

The 1st appellant company has an authorised capital of RM5 million divided into 5,000 shares of RM1,000 each of which 3,600 shares had been issued and fullypaid. On the other hand, the 2nd appellant company has an authorised capital of RM10 million divided into 10 million shares of RM1 each of which 7,520,000 shares had been issued to the 1st appellant and fully paid. There are no other shareholders in the 2nd appellant company save for the 1st appellant company.

On 15 January 1996 a reconstruction agreement was entered into between the 1st and 2nd appellant companies wherein was provided for the sale and purchase of a piece of land and registered in the name of the 1st appellant company for a consideration of RM7,800,000.

We now come to the role played by the collector. On 3 April 1996 the common solicitors for both appellants wrote to the collector for relief from stamp duty under s. 15A of the Act in respect of the transfer.

The collector on 10 April 1996 wrote back requesting for a copy of a confirmation from the Foreign Investment Committee ("FIC") that approval for the transfer of the land was not needed.

The common solicitors wrote to the collector stating that no approval was required for the transfer but the collector notified the solicitors in a letter dated 26 April 1996 that his office had been informed by the FIC that any transfer involving more than RM5 million would require the FIC's approval although the transfer maybe between associated companies and that he was informed by the FIC to let FIC know of any company which refuses to comply with the FIC requirement (see letter, Appeal Record, 101).

The solicitors applied to the FIC for approval. The FIC wrote to say (see letter dated 4 September 1996, Appeal Record, 104) that there was no objection to the transaction provided that the 2nd appellant would have 30% equity for a Bumiputera company before 31 December 1997.

The 1st and 2nd appellant companies terminated the first reconstruction agreement and a second reconstruction agreement was entered into on 28 October 1996. A fresh memorandum of transfer Form 14A was also executed.

The solicitors then wrote to the collector for exemption from payment of stamp duty under s. 15A of the Act on the fresh transfer instrument and enclosed, *inter alia*, a copy of the fresh agreement and a copy of the consent of the FIC to the transaction.

The solicitors pointed out to the collector that under the fresh agreement the 1st appellant had agreed to transfer and the 2nd appellant had agreed to buy the said land (subject matter of the transfer in NLC Form 14A executed pursuant to the fresh agreement) for a consideration of RM7,800,000, such consideration to be satisfied by the 2nd appellant as follows:

(a) to the amount of RM7,020,000 by the allotment and issuance to the 1st appellant by the 2nd appellant company of 7,020,000 shares of RM1 credited as fully paid up; and

(b) as to the balance amount of RM780,000 by cash.

To be noted is that the nature of the consideration in the fresh agreement is no different from that of the earlier agreement that had been cancelled.

The solicitors stated that as required under s. 15A of the Act the following conditions had been satisfied thus:

(i) The effect of the transfer in NLC Form 14A is to transfer, *inter alia*, beneficial interest in the land from the (1st appellant company) to the (2nd appellant company);

(ii) The (1st and 2nd appellant companies) are associated companies. (The 1st appellant company) holds one hundred per centum (100%) of the issued share capital of the (2nd appellant company);

(iii) The consideration for the transfer in NLC Form 14A shall be received wholly by the (1st appellant company);

(iv) The (1st and 2nd appellant companies) have not ceased to be associated companies within the meaning of s. 15A of the Act.

On 29 April 1997 the collector disallowed the application and sent a notice of assessment on the fresh transfer instrument. The *ad valorem* stamp duty was assessed under Item 32(a) of the First Schedule to the Act at RM286,000. The duty was paid on 5 May 1997.

Is stamp duty payable?

Before we go further we need to look at s. 15A. Particular attention is drawn to s. 15A(4)(c). The relevant provisions including s. 15A(4)(c) read:

Relief from stamp duty in case of transfer of property between associated companies.

15A (1) Stamp duty under paragraph (a) or (b) of Item 32 in the First Schedule shall not be chargeable on any instrument to which this section applies.

Provided that no such instrument shall be deemed to be duly stamped unless either it is stamped with the duty to which it would but for this section be liable or it has been brought to the Collector under section 36 and he has certified under section 37 either that the full duty with which it is chargeable has been paid, or that it is not chargeable with duty.

(2) This section applies to any instrument with respect to which it is shown to the satisfaction of the Collector that the effect thereof is to transfer a beneficial interest in property from one company with limited liability to another such company, and that the companies in question are associated, that is to say, one is the beneficial owner of not less than ninety per centum of the issued share capital of the other, or that a third company with limited liability is the beneficial owner of not less than ninety per centum of the issued share capital of each of the aforesaid companies.

(3) ...

(4) This section shall not apply to any instrument unless it is also shown to the satisfaction of the Collector that the instrument was not executed in pursuance of or in connection with an arrangement whereunder:

(a) ...

(b) ...

(c) the transferor and the transferee were to cease to be associated within the meaning of this section by reason of a change in the percentage of the issued share capital of the transferee in the beneficial ownership (within the meaning of this section) of the transferor or a third company.

As was correctly pointed out by the learned High Court judge the issue for determination is whether the fresh instrument of transfer was executed in "pursuance of or in connection with an arrangement" (see s. 15A(4)) whereunder the 1st appellant company (the transferor company) and the 2nd appellant company (the transferee company) were to cease to be associated within the meaning of s. 15A(4)(c) of the Act. This is, of course, in the context of the FIC condition of approval, for the transfer of 30% of the equity of the transferee company, to a Bumiputera company.

Before the learned High Court judge and before us Encik Manecksha submitted that stamp duty was not payable by reason of the fact that at the time of the application for the exemption, and the date of the transfer, the transferor company owned more than 90% of the shares in the transferee company and thus were entitled to exemption from stamp duty under s. 15A(1). According to him it was never the intention of the appellants to relinquish any part of their shares to a third party; that the divestment of 30% of their shares to a

a third party (within the specified date prescribed by the FIC which date had then been extended) cannot in such circumstances be regarded "as pursuant to" or "in connection with" any "arrangement" made by the appellants but must be viewed as a condition "imposed" upon them by the FIC.

b It was his submission that even if, at some future time, the transferee company were to divest 30% of its share in favour of a Bumiputera company, this will be done *post facto*, and according to him that is outside the ambit of s. 15A(4)(c) of the Act.

Encik Ahmad Khairuddin bin Abdullah, counsel for the collector, submitted
c that in cases such as this, the onus of proof lies on the party claiming the relief (*Holmleigh (Holdings) Ltd v. IRC* 46 TC 435 at 452; *Escoigne Properties Ltd v. IRC* [1958] AC 549 at 564) to show that there was no "arrangement" whereby the transferor company (the 1st appellant) were to cease to hold less than 90% of the issued share capital or beneficial ownership of the transferee
d company.

He also submitted that on the facts of this case the appellants were not right in saying that it was the FIC that compelled them to divest 30% of the shares in the transferee company to a third party (a Bumiputera company); that they were not right in saying that the potential divestment was forced upon the
e party concerned (the transferor company); that it was incorrect to say that there was no "arrangement" whereby 30% equity in the transferee company would be divested to a Bumiputera company by reason of it being "involuntary".

Counsel for the collector also drew our attention to the fact that the appellants
f had a choice, upon termination of the first agreement and cancellation of the transfer Form 14A dated 6 March 1996, by reason of not obtaining prior approval of the FIC, whether to proceed or not to proceed with the transaction in question. Upon receipt of the FIC's approval subject to the condition that the transferee company was to have 30% Bumiputera equity before 31 December 1997 (extended by FIC), the appellants chose to proceed with the
g said transfer and a fresh agreement for the sale and purchase of the said land was executed and a fresh instrument of transfer was executed.

It may be noted that the fresh agreement executed made express reference to the earlier agreement which had been terminated as well as the instrument of
h transfer which had been cancelled as "the consent of the FIC to the sale of the said property has not been obtained". The fresh agreement then made express reference to the shares which were allotted and issued to the transferor company and, that it "shall form part of the purchase price in the event the FIC's consent is subsequently obtained and the vendor sells the said property
i to the purchaser thereafter". The fresh agreement also made express reference

to the FIC's approval that had been obtained ie, that "the FIC consent has now been obtained and the vendor has agreed to sell and the purchaser has agreed to purchase the said property ... ."

It was the submission of counsel for the collector that the FIC approval is clearly a condition precedent to the execution of the fresh agreement. The appellants had a further choice when the approval given was conditional. The appellants at that stage could either abort the sale (as they had done in the first instance) or accept the condition imposed and proceed with the sale. On the facts, they had made a considered decision and again chose to proceed. By executing the fresh agreement the appellants clearly had accepted the condition imposed by the FIC in relation to the divestment of the 30% imposed. In such circumstances it was his submission that counsel for the appellants was not right in saying the appellants were "compelled" to divest 30% equity in the transferee company to a 3rd party.

Encik Ahmad Khairuddin concluded by saying that by executing the fresh agreement, and in accepting the condition imposed by the FIC, there was therefore an "arrangement' where the transferor company will ultimately cease to be "associated" with the transferee company within the meaning of s. 15A(4) of the Act as a divestment of a 30% equity stake in the transferee company to a Bumiputera company will have to be complied by 31 December 1997 (which at time of hearing in the High Court had been extended to 31 December 1998).

The learned High Court judge was of the view that it is incumbent upon the appellants to prove that they come within the ambit of s. 15A(4)(c). While she agreed with the submission by Encik Manecksha that in interpreting the words "in connection with" and "arrangement" that liability of an instrument to stamp duty must necessarily be assessed as at the date of the instrument ie, 30 November 1996, however, in interpreting these words she was of the view that effect must also be given to the words "were to cease to be associated" in s. 15A(4)(c) of the Act, which are cast in the future tense. She gave the phrase "were to cease to be associated" its literal and ordinary meaning and held that the collector had not erred, as at the date of the instrument (ie, 30 November 1996) a looking into the future as to whether an "arrangement" exists, as to whether the transferor company will no longer hold 90% of the equity stake in the transferee company, was needed. She further held on the facts of the case that there clearly was such an "arrangement", by which arrangement, the transferor company and the transferee would no longer be "associated" within the meaning of s. 15A(4)(c) of the Act, and thus, the instrument of transfer does not qualify for exemption. She was of the view that the collector therefore, on the facts of the case, did

not err in taking into consideration whether there was an "arrangement", at the time of the execution of the instrument, that the appellants would cease to be "associated" in the future.

With respect we do not agree with the learned judge's decision.

Before we proceed further let us dispose off the point raised by Encik Manecksha that nowhere in s. 15A of the Act is there a requirement for approval by the FIC before exemption under s. 15A is given. We agree there is no express provision. The point, however is, and this was observed by the learned High Court judge, the appellants acceded to the request of the collector to refer this matter to the FIC and cancelled this first agreement. True if they did not refer the matter to the FIC the collector in all probability would not have entertained the application for exemption but that decision, in our view, could have been properly challenged under different proceedings in the High Court.

Then again having been informed of the FIC's decision that the 2nd appellant had to divest 30% of its equity to a Bumiputera company or companies it was open to the appellants to have appealed to the FIC or to have the decision similarly challenged.

Our view is that neither the High Court hearing the appeal by way of case stated nor this court hearing the appeal on the decision of the High Court is procedurally and substantively properly seised of the issues and relevant facts (and further, so far as the FIC is concerned, the body is not represented in the proceedings) to be able to decide on matters relating to statutory authorities or governmental committees making decisions which allegedly are in excess of their powers. On the facts clearly the appellants acceded to the collector's request to them to refer the matter to the FIC and they did not demur to the condition for the approval by FIC of the transaction.

Our remit is to consider whether on the law and on the facts adduced the collector was right in rejecting the application for exemption under s. 15A. Was the transfer of land from the 1st appellant to the 2nd appellant effected in pursuance of an arrangement where the two companies were to cease to be associated by reason of a change in the percentage of the issued share capital within the beneficial ownership of the transferor, ie, the 1st appellant?

We would like to point out that a similar provision, s. 27(3) of the English Finance Act read with s. 42 of the Finance Act 1940 which together with three subsections – (a), (b) and (c) (like our sub-ss. (a), b and (c) of s. 15A)), was enacted with the intention of closing loopholes revealed by tax avoidance scheme. As was observed by Monroe and Nock: *Law of Stamp Duties*, 5th edn at p. 320, footnote 46:

Most earlier avoidance schemes involve variations on one or other of the following two themes:

THEME A. Company 1 wishes (in effect) to sell property to Company 2. It forms Company X as its wholly-owned subsidiary and sells the property to Company X for shares renounced in favour of Company 2 for cash. If relief is obtained on the transfer to Company X no stamp duty is payable.

This theme was the basis of the unsuccessful claim for the relief in *Holmleigh (Holdings) Ltd v. IRC* [1958] 46 TC 435, and the successful scheme in *Shop and Store Developments Ltd v. IRC* [1967] 1 AC 472.

THEME B. Company 1 wishes (in effect) to sell property to Company 2. It forms Company X as its wholly-owned subsidiary and sells the property to Company X leaving the purchase price outstanding as a debt (either to Company 1 or a bank). The shares in Company X are still of very small value and are sold to Company 2 attracting very little duty, or Company 2 is permitted to subscribe for shares in the transferee company. Again, if the relief is obtained on the transfer to Company X, stamp duty is avoided. This theme was the basis of the unsuccessful claim for relief in *Curzon Offices Ltd v. IRC* [1944] 1 All ER 606; and of the successful scheme in *Times Newspapers Ltd v. IRC* [1973] Ch. 155.

Both these themes are now clearly useless by virtue of F.A. 1967, s. 27(3)(c).

We next look at the expression "in connection with" and "arrangement" appearing in s. 15A(4)(c), a provision similar to s. 42 of the English Finance Act 1930 read with s. 27(3) of the Finance Act 1967. As to their meaning counsel for the collector and the High Court judge relied on this passage from Monroe and Nock at p. 335 where the authors commented on these words used in s. 27(3) of the Finance Act 1967 which are substantially similar to the words used in s. 15A(4)(c) of our Act:

Generally it is to be observed that the words 'in connection with' and 'arrangement' used in section 27(3) of the Finance Act 1967 are very wide. There need be no legally binding nexus between the conveyance or transfer and the offending arrangement in connection with which it is executed, but it is conceived that as the liability of an instrument to stamp duty must be capable of assessment at the date of the instrument, the arrangement must be in existence (the parties thereto being identified) at that time and a mere intention to enter into a relevant arrangement if a suitable opportunity arises is not sufficient. At any rate the arrangement must (if it is not already in the past) be one under which either expressly or by necessary inference the offending act or event will be performed or occur, it is not enough that it will probably be done or occur.

We think, however, that the passage quoted supports the appellants' appeal.

We know that s. 15A(4) is designed to prevent tax avoidance and that s. 15A(4)(c) is the catch all provision to prevent tax avoidance. However, in the appeal before us there is absolutely no hint that the associated companies have made an arrangement to avoid paying stamp duty on the first transfer instrument or the second transfer instrument. From the first agreement it is clear that no other party was involved in the earlier arrangement to transfer the said land and clearly there was no issue of an unassociated party buying part of the shares which the 1st appellant company held in the 2nd appellant company and diluting its beneficial ownership of the 2nd appellant company.

As for the fresh agreement clearly too there is no arrangement by the appellants to avoid paying stamp duty on the fresh transfer instrument of the same property on the same consideration. Though there is reference in the second agreement to the consent of the FIC to the transfer with the condition that 30% of the equity of the 2nd appellant company be divested to a Bumiputera company by a certain date that condition is a condition which reflected the policy of the FIC, a governmental committee, for the restructuring of the two companies to accommodate Bumiputera interest meaning that the FIC intented that the 1st appellant company to sell at least 30% of its share in the 2nd appellant company to a Bumiputera company so that the Bumiputera company would have a 30% equity in the 2nd appellant company by a certain date. The FIC was not a party to the fresh agreement entered into between the 1st and 2nd appellant companies. In the context of the whole of s. 15A there cannot be said that an imposition of a condition by a stranger (the FIC) which the appellant companies felt compelled to abide by meant that the appellant companies intended to avoid paying stamp duty on the transfer instrument. It would be unjust to interpret s. 15A(4)(c) in that way.

The next consideration to be made is that the divestment of the equity is to a Bumiputera company which has yet to be identified. There would have to be first of all a Bumiputera company that would be willing to be involved in the business objectives of the 2nd appellant company and secondly, for the company being willing to pay the price to the 1st appellant for buying the equity according to market forces. Clearly by its very nature the condition imposed by the FIC is dependent on the willingness of a Bumiputera company to be involved in the purchase of the shares which may not even materialise. The condition contains matters which are uncertain as to the identity of the purchaser and the time that event of divestment will be realised; in fact the condition may or may not be realised. We know for a fact that the FIC had to extend the first date of 31 December 1997 by which the 2nd appellant would have 30% equity for a Bumiputera company.

Our view is that the restructuring scheme is not for the purpose of tax avoidance. Our view is that the issue of exemption from stamp duty on the transfer instrument between the 1st appellant and the 2nd appellant is separate from the issue of the imposition of the condition by the FIC which is a policy matter where the remedy for non compliance of the condition lies elsewhere, not under s. 15A. From the facts pertinent to this case we are of the view that the justice of the case shows that s. 15A(4)(c) does not apply and the fresh transfer instrument is exempt from stamp duty. Thus the collector was wrong in rejecting the application for exemption of stamp duty.

We allow the appeal with costs and we order the assessment paid on the transfer instrument be refunded. Deposit to be refunded to the appellant.